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12 **DISTRICT COURT**
 13 **CLARK COUNTY, NEVADA**

14 * * *

15 RICHARD and JEANNE EINSIEDEL, husband)
 16 and wife; KARL and MARY BRUNER, husband)
 17 and wife; STEPHEN and LINDA MYOTT,)
 18 husband and wife; STUART and HELEN)
 19 O'BRIEN, husband and wife; ALAN and VIIVE)
 20 HYMAN, husband and wife; MARY RICHARD,)
 21 an individual; MICHIKO JUDICE, an individual;)
 22 RAYMOND and SUSAN MCIVER, husband and)
 23 wife; DONALD and SANDRA COOLEY, husband)
 24 and wife; JOSEPH and ELLEN DEROSE, husband)
 25 and wife; ROSE ANTONELLO, an individual;)
 26 VERDA DUNCAN, an individual; ELLIOT and)
 27 PHYLLIS BARON, husband and wife; RICHARD)
 28 and DEANNA GARCIA, husband and wife;)
 EDWARD and JEAN MORKEN, husband and)
 wife; MELVIN and GLORIA WILSON, husband)
 and wife; JEANNIE SUE PEARCE, an individual;)
 and WILLIAM and ELSY PADILLA-PEGAN,)
 husband and wife,)

Plaintiffs,

vs.

PN II, INC. dba PULTE HOMES OF NEVADA)
 dba DEL WEBB aka THE COMMUNITIES OF)
 DEL WEBB, a Nevada corporation; DEL WEBB)
 COMMUNITIES, INC. aka DEL WEBB, a Nevada)
 corporation;)

Defendants.

**PLAINTIFFS' (1) REPLY IN
 SUPPORT OF MOTION FOR
 LEAVE TO AMEND COMPLAINT;
 AND (2) OPPOSITION TO
 COUNTER MOTION FOR PARTIAL
 SUMMARY JUDGMENT ON
 PLAINTIFFS' FIRST CLAIM FOR
 RELIEF, TO STRIKE PLAINTIFFS'
 PRAYER FOR PUNITIVE
 DAMAGES, AND FOR SUMMARY
 JUDGMENT IN FAVOR OF
 DEFENDANT PNII, INC. dba PULTE
 HOMES OF NEVADA**

CASE NO.: A546409
 DEPT. NO.: XXII

Hearing Date: April 21, 2009
 Hearing Time: 8:30 a.m.

(ELECTRONIC FILING CASE)

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **REPLY IN SUPPORT OF MOTION FOR LEAVE TO AMEND COMPLAINT**

4 **A. STANDARD OF REVIEW**

5 **1. LEAVE TO AMEND SHOULD BE FREELY GRANTED**

6 NRCP 15(a) provides:

7 . . . a party may amend his pleading only by leave of court . . . and leave shall be
8 freely given when justice so requires . . .

9 In the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory
10 motive on the part of the movant – the leave to amend should be freely granted. *Stephens v. Southern*
11 *Nevada Music Co.*, 89 Nev. 104, 507 P.2d 138 (1973). The grant or denial of an opportunity to amend
12 is within the discretion of the trial court, but outright refusal to grant the leave without any justifying
13 reason appearing for the denial is not an exercise of discretion, it is merely an abuse of that discretion
14 and inconsistent with the spirit of the Nevada Rules of Civil Procedure. *Adamson v. Bowker*, 85 Nev.
15 104, 507 P.2d 138 (1973).

16 **2. THE AMENDMENT SHOULD RELATE BACK**

17 If the original pleading gives fair notice of the facts from which a new claim arises, the
18 amendment should relate back for limitations purposes. *Nelson v. City of Las Vegas*, 99 Nev. 548, 665
19 P.2d 1141 (1983). Whenever the claim or defense asserted in the amended pleading arose out of the
20 conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the
21 amendment relates back to the date of the original pleading. NRCP 15(c).

22 **3. NEVADA IS A NOTICE PLEADING STATE**

23 NRCP 8(a) requires that a pleading contain only a short and plain statement showing that the
24 pleader is entitled to relief. *Brown v. Keller*, 97 Nev. 582, 636 P.2d 874 (1981). Each averment of a
25 pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.
26 NRCP 8(e)(1).

27 A complaint must set forth sufficient facts to establish all necessary elements of a claim for relief
28 so that the adverse party has adequate notice of the nature of the claim and relief sought. *Hay v. Hay*,
100 Nev. 196, 678 P.2d 672 (1984). Courts liberally construe pleadings to place into issue matters

1 which are fairly noticed to the adverse party. *Id.* Pleading of conclusions, either of law or fact, is
2 sufficient so long as pleading gives fair notice of the nature and basis of the claim. *Crucil v. Carson*
3 *City*, 95 Nev. 583, 600 P.2d 216 (1979).

4 Nevada has adopted the heightened pleading requirement of Federal Rules of Civil Procedure
5 9(b) for fraud claims. Under NRCP 9(b), “all averments of fraud or mistake, the circumstances
6 constituting fraud or mistake shall be stated with particularity.” “Specifically, the circumstances that
7 must be detailed include averments to the time, the place, the identity of the parties involved, and the
8 nature of the fraud or mistake.” *Brown, supra*, at 583-584, 874. The reason Nevada requires heighten
9 pleading for fraud is "in order to afford adequate notice to the opposing part[ies]," "so that they can
10 defend against the charge and not just deny that they have done anything wrong." *Rocker v. KPMG LLP*,
11 148 P.3d 703, 707-708, 122 Nev. Adv. Rep. 101 (2006) (*overruled in part*) (quoting *Ivory Ranch v.*
12 *Quinn River Ranch*, 101 Nev. 471, 472-73, 705 P.2d 673, 675 (1985), *Neubronner v. Milken*, 6 F.3d
13 666, 671 (9th Cir. 1993).

14 The Supreme Court of Nevada applied a relaxed standard of NRCP 9(b) in *Rocker, supra*. In that
15 case, the Court found that the plaintiffs (a group of consumers) did not plead fraud with particularity
16 because a great deal of the information regarding the fraud was in the hands of the Defendant. *Id.* at
17 708.

18 The Court noted:

19 “This difficulty places the consumers in a classic catch-22—they are required to file a
20 complaint to enable them to conduct discovery to ascertain the relevant information they
21 need, but they cannot file a complaint with sufficient particularity because they do not
22 know the information contained in KPMG’s documents. Many courts have addressed
23 similar situations and recognize an exception to the particularized pleading
24 requirements.”

25 *Id.* at 708.

26 The Court further held that in this situation a relaxed application of the NRCP(9)(b) would apply
27 which would allow a plaintiff to conduct discovery and amend their complaint to meet the pleading
28 requirements. *Id.* at 709. The Court explained:

“This exception strikes a reasonable balance between NRCP(9)(b)’s stringent
requirements for pleading fraud and a plaintiffs’s inability to allege the full factual basis
concerning fraud because information and documents are sole in the defendant’s
possession and cannot be secured without formal, legal discovery. Therefore, we adopt
this relaxed standard in situations where the facts necessary for pleading with

1 particularity “are peculiarly within the defendant’s knowledge or are readily obtainable
2 by him.” *Id.* at 709 (quoting *Neubronner v. Milken*, 6 F.3d 666 at 672).

3 In addition, the Court held as long as the Plaintiffs showed in their complaint a strong inference
4 of fraud and showed that they cannot plead with more particularity because the information is in
5 Defendant’s control, Plaintiffs should be allowed to conduct discovery and amend the pleadings to
6 comply with NRCP 9(b). *Id.*

7 **B. PLAINTIFFS HAVE PLED FRAUD CLAIMS WITH PARTICULARITY**

8 Defendants’ Opposition to Plaintiffs’ Motion for Leave to Amend the Complaint (“Motion”)
9 with respect to a fraud claim makes it clear that Defendants failed to read Plaintiffs’ proposed amended
10 complaint, which was attached to the Motion. Defendants allege that Plaintiffs did not state the time,
11 place, names of individuals, or any other specific activity related to fraud. However, a plain reading of
12 Plaintiffs’ [proposed] Amended Complaint demonstrates that Plaintiffs have made specific allegations
13 including the nature of the fraud, the names of the individuals involved, the dates the fraud occurred, and
14 the like. Plaintiffs detail in chart format the nature of the fraud, the dates when the fraud occurred with
15 each individual Plaintiff and the specific people involved. In the proposed Amended Complaint,
16 *attached to the Motion as Exhibit 1, Plaintiffs allege:*

17 **IX.**

18 **FOURTH CLAIM FOR RELIEF**

19 ***(Fraudulent Inducement and Fraudulent Concealment of Defects/Failure to Disclose Defects)***

20 **78. *Plaintiffs hereby incorporate and re-allege all previous paragraphs as though fully set***
21 ***forth herein.***

22 **79. *Plaintiffs are informed and believe that the defects and deficiencies as set forth in this***
23 ***First Amended Complaint, which include those related to design, planning, supervision or***
24 ***observation of construction or the construction of the Subject Property and related structures,***
25 ***improvements or appurtenances, were known by Defendants, or through the use of reasonable***
26 ***diligence should have been known by Defendants, when they designed, planned, constructed and sold***
27 ***the Subject Properties; and the defects and deficiencies, and resulting damage were latent, meaning***
28 ***they were not apparent to Plaintiffs or their relatives/agents by reasonable inspection.***

80. *Plaintiffs are informed and believe that the Defendants negligently, recklessly,*

1 *deliberately, purposefully, consciously and/or intentionally induced Plaintiffs into signing purchase*
 2 *or sale agreements, and concealed the defects and deficiencies as set forth in this First Amended*
 3 *Complaint, and failed to disclose them, prior to distribution and sale of the Subject Property to the*
 4 *Plaintiffs, which occurred with particularity as follows:*

<p>5 <i>Stephen and Linda Myott</i></p>	<p>6 <i>Purchase Agreement signed</i> <i>on 9/11/01; Sales Associate</i> <i>was Kay McCallister</i> <i>(#04680), who signed</i> <i>Purchase Agreement and</i> <i>Duties Owed by Realtor on</i> <i>1/30/01; and James W. Bond</i> <i>was the broker who signed the</i> <i>Purchase Agreement on</i> <i>2/4/01; closed escrow on</i> <i>9/11/01; Deed transferred by</i> <i>S. O'Connor, Vice President</i></p>	<p>7 <i>During the purchase/sale</i> <i>transaction and up to closing,</i> <i>it was represented to</i> <i>Plaintiffs that they would</i> <i>receive a non-defective</i> <i>plumbing system as designed</i> <i>and specified on the approved</i> <i>plans; and a house without</i> <i>constructional defects; and</i> <i>Defendants omitted material</i> <i>facts from disclosures on</i> <i>which Plaintiffs relied to their</i> <i>detriment and were induced</i> <i>into purchasing their</i> <i>defective home</i></p>
<p>13 <i>Stuart and Helen O'Brien</i></p>	<p>14 <i>Purchase Agreement signed</i> <i>on 2/3/01; Sales Associates</i> <i>were Bonnie Michaels</i> <i>(#16614) and Debe Corn</i> <i>(#43647), who signed</i> <i>Purchase Agreement and</i> <i>Duties Owed by Realtor on</i> <i>1/31/01; and James W. Bond</i> <i>was broker who signed</i> <i>Purchase Agreement on</i> <i>2/6/01; closed escrow on</i> <i>8/6/02; Homeowner</i> <i>Coordinators were Sheila</i> <i>Holdren, Paula Young and</i> <i>Nancy Rutherford; Gold Key</i> <i>representative was Pattie Orr;</i> <i>Deed transferred by S.</i> <i>O'Connor, Vice President</i></p>	<p>15 <i>During the purchase/sale</i> <i>transaction and up to closing,</i> <i>it was represented to</i> <i>Plaintiffs that they would</i> <i>receive a non-defective</i> <i>plumbing system as designed</i> <i>and specified on the approved</i> <i>plans; and a house without</i> <i>constructional defects; and</i> <i>Defendants omitted material</i> <i>facts from disclosures on</i> <i>which Plaintiffs relied to their</i> <i>detriment and were induced</i> <i>into purchasing their</i> <i>defective home</i></p>

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<i>William and Elsy Pedilla-Pegan</i>	<i>Purchase Agreement signed on 3/7/03; Sales Associate was Corey von Kleinhans-Wolf (#19240), who signed Purchase Agreement and Duties Owed by Realtor on 3/3/03; and James W. Bond was broker who signed Purchase Agreement on 3/9/03; closed escrow on 4/8/03; Deed transferred by S. O'Connor, Vice President</i>	<i>During the purchase/sale transaction and up to closing, it was represented to Plaintiffs that they would receive a non-defective plumbing system as designed and specified on the approved plans; and a house without constructional defects; and Defendants omitted material facts from disclosures on which Plaintiffs relied to their detriment and were induced into purchasing their defective home</i>
<i>Melvin and Gloria Wilson</i>	<i>Purchase Agreement signed on 3/7/02; Sales Associate was Debbie Johnson (#16638), who signed Purchase Agreement and Duties Owed by Realtor on 3/8/02; and James W. Bond was broker who signed Purchase Agreement on 3/8/02; closed escrow on 7/16/02; Deed transferred by S. O'Connor, Vice President</i>	<i>During the purchase/sale transaction and up to closing, it was represented to Plaintiffs that they would receive a non-defective plumbing system as designed and specified on the approved plans; and a house without constructional defects; and Defendants omitted material facts from disclosures on which Plaintiffs relied to their detriment and were induced into purchasing their defective home</i>
<i>Richard and Jeannie Einsiedel (2016 Tulip Grove Court)</i>	<i>Purchase Agreement signed on 5/19/01; Sales Associate was Solly Nash (#36043), who signed Purchase Agreement and Duties Owed by Realtor on 5/19/01; and James W. Bond was broker who signed Purchase Agreement on 5/27/01; closed escrow on 5/7/02; Deed transferred by S. O'Connor, Vice President</i>	<i>During the purchase/sale transaction and up to closing, it was represented to Plaintiffs that they would receive a non-defective plumbing system as designed and specified on the approved plans; and a house without constructional defects; and Defendants omitted material facts from disclosures on which Plaintiffs relied to their detriment and were induced into purchasing their defective home</i>

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<i>Richard and Jeannie Einsiedel (2824 Thunder Bay)</i>	<i>Purchase Agreement signed on 11/15/02; Sales Associate was Harriet Rubin (#34927), who signed Purchase Agreement and Duties Owed by Realtor on 11/15/02; and James W. Bond was broker who signed Purchase Agreement on 11/25/02; closed escrow on 2/13/03; Deed transferred by S. O'Connor, Vice President</i>	<i>During the purchase/sale transaction and up to closing, it was represented to Plaintiffs that they would receive a non-defective plumbing system as designed and specified on the approved plans; and a house without constructional defects; and Defendants omitted material facts from disclosures on which Plaintiffs relied to their detriment and were induced into purchasing their defective home</i>
<i>Richard and Deanna Garcia</i>	<i>Purchase Agreement signed on 5/17/01; Sales Associates were Carole Newberry and Marty Teemer (#22390), who signed Purchase Agreement and Duties Owed by Realtor on 5/24/01; and James W. Bond was broker who signed Purchase Agreement on 5/22/01; closed escrow on 11/29/01; Deed transferred by S. O'Connor, Vice President</i>	<i>During the purchase/sale transaction and up to closing, it was represented to Plaintiffs that they would receive a non-defective plumbing system as designed and specified on the approved plans; and a house without constructional defects; and Defendants omitted material facts from disclosures on which Plaintiffs relied to their detriment and were induced into purchasing their defective home</i>
<i>Verda Duncan</i>	<i>Purchase Agreement signed on 8/28/02; Sales Associate was Charlene Kincaid (#19601), who signed Purchase Agreement and Duties Owed by Realtor on 8/25/02; and James W. Bond was broker who signed Purchase Agreement on 9/1/02; closed escrow on 3/18/03; Deed transferred by S. O'Connor, Vice President</i>	<i>During the purchase/sale transaction and up to closing, it was represented to Plaintiffs that they would receive a non-defective plumbing system as designed and specified on the approved plans; and a house without constructional defects; and Defendants omitted material facts from disclosures on which Plaintiff relied to her detriment and was induced into purchasing her defective home</i>

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<i>Jeannie Sue Pearce</i>	<i>Purchase Agreement signed on or about 10/28/03, purchased from Jeannie P. Storseth, who purchased home from Defendants on or about March 6, 2003; Plaintiff closed escrow 10/28/03</i>	<i>During the purchase/sale transaction and up to closing, it was represented to the original owner that she would receive a non-defective plumbing system as designed and specified on the approved plans; and a house without constructional defects; and Defendants omitted material facts from disclosures on which the original owner and Plaintiff relied to their detriment and were induced into purchasing their defective home</i>
<i>Donald and Sandra Cooley</i>	<i>Purchase Agreement signed on or about 2/23/04, purchased from Marilyn M. Erwin and/or Marilyn M. Erwin Living Trust, who purchased home from Defendants on or about 8/28/00; Plaintiffs closed escrow 1/23/04</i>	<i>During the purchase/sale transaction and up to closing, it was represented to the original owner that she would receive a non-defective plumbing system as designed and specified on the approved plans; and a house without constructional defects; and Defendants omitted material facts from disclosures on which the original owner and Plaintiffs relied to their detriment and were induced into purchasing their defective home</i>
<i>Elliott and Phyllis Baron</i>	<i>Purchase Agreement signed on 3/19/01; Sales Associate was Charlie Muffley (#46752), who signed Purchase Agreement and Duties Owed by Realtor on 3/19/01; and James W. Bond was broker who signed Purchase Agreement on 3/22/01; closed escrow on 12/19/01; Deed transferred by S. O'Connor, Vice President; Homeowner Coordinators were Sheila Holdren, Paula Young and Nancy Rutherford</i>	<i>During the purchase/sale transaction and up to closing, it was represented to Plaintiffs that they would receive a non-defective plumbing system as designed and specified on the approved plans; and a house without constructional defects; and Defendants omitted material facts from disclosures on which Plaintiffs relied to their detriment and were induced into purchasing their defective home</i>

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<i>Alan and Viive Hyman</i>	<i>Purchase Agreement signed on 12/3/01; Sales Associate was Deborah Johnson (#16638), who signed Purchase Agreement and Duties Owed by Realtor on 11/28/01; and James W. Bond was broker who signed Purchase Agreement on 12/7/01; closed escrow on 1/25/02; Deed transferred by S. O'Connor, Vice President</i>	<i>During the purchase/sale transaction and up to closing, it was represented to Plaintiffs that they would receive a non-defective plumbing system as designed and specified on the approved plans; and a house without constructional defects; and Defendants omitted material facts from disclosures on which Plaintiffs relied to their detriment and were induced into purchasing their defective home</i>
<i>Catherine Marie Antonello Davis, Trustee of the Antonello Family Revocable Living Trust</i>	<i>Purchase Agreement signed on 7/29/02; Sales Associate was Corey von Kleinhans-Wolf (#19240), who signed Purchase Agreement and Duties Owed by Realtor on 7/29/02; and James W. Bond was broker who signed Purchase Agreement on 8/2/02; closed escrow on 1/15/03; Deed transferred by S. O'Connor, Vice President</i>	<i>During the purchase/sale transaction and up to closing, it was represented to Plaintiff that she would receive a non-defective plumbing system as designed and specified on the approved plans; and a house without constructional defects; and Defendants omitted material facts from disclosures on which Plaintiff relied to her detriment and were induced into purchasing her defective home</i>
<i>Karl and Mary Bruner</i>	<i>Purchase Agreement signed on 3/7/01; Sales Associate was Stephen A. Gross (#36276), who signed Purchase Agreement and Duties Owed by Realtor on 3/9/01; and James W. Bond was broker who signed Purchase Agreement on 3/7/01; closed escrow on 1/25/02; Deed transferred by S. O'Connor, Vice President; Homeowner Coordinators were Sheila Holdren, Paula Young and Nancy Rutherford</i>	<i>During the purchase/sale transaction and up to closing, it was represented to Plaintiffs that they would receive a non-defective plumbing system as designed and specified on the approved plans; and a house without constructional defects; and Defendants omitted material facts from disclosures on which Plaintiffs relied to their detriment and were induced into purchasing their defective home</i>

<p>1 <i>Michiko Judice</i></p> <p>2</p> <p>3</p> <p>4</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p>	<p><i>Purchase Agreement signed on 3/9/02; Sales Associate was Yvonne Mardian (#30955), who signed Purchase Agreement and Duties Owed by Realtor on 3/4/02; and James W. Bond was broker who signed Purchase Agreement on 3/13/02; closed escrow on 7/16/02; Deed transferred by S. O'Connor, Vice President</i></p>	<p><i>During the purchase/sale transaction and up to closing, it was represented to Plaintiffs that they would receive a non-defective plumbing system as designed and specified on the approved plans; and a house without constructional defects; and Defendants omitted material facts from disclosures on which Plaintiff relied to her detriment and was induced into purchasing her defective home</i></p>
<p>9 <i>Edward and Jean Morken</i></p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p>	<p><i>Purchase Agreement signed on 8/19/01; Sales Associate was Doug Proudfit (#47239), who signed Purchase Agreement and Duties Owed by Realtor on 8/19/01; and James W. Bond was broker who signed Purchase Agreement on 8/21/01; closed escrow on 11/15/01; Deed transferred by S. O'Connor, Vice President</i></p>	<p><i>During the purchase/sale transaction and up to closing, it was represented to Plaintiffs that they would receive a non-defective plumbing system as designed and specified on the approved plans; and a house without constructional defects; and Defendants omitted material facts from disclosures on which Plaintiffs relied to their detriment and were induced into purchasing their defective home</i></p>
<p>17 <i>Raymond and Susan McIver</i></p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p>	<p><i>Purchase Agreement signed on 1/11/02; Sales Associates were Corey von Kleinhans-Wolf and Susan Corine Porter (Wolf) (#19240), who signed Purchase Agreement and Duties Owed by Realtor on 1/11/02; and James W. Bond was broker who signed Purchase Agreement on 1/15/02; closed escrow on 3/8/02; Deed transferred by S. O'Connor, Vice President</i></p>	<p><i>During the purchase/sale transaction and up to closing, it was represented to Plaintiffs that they would receive a non-defective plumbing system as designed and specified on the approved plans; and a house without constructional defects; and Defendants omitted material facts from disclosures on which Plaintiffs relied to their detriment and were induced into purchasing their defective home</i></p>

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26 ***Moreover, Plaintiffs dealt with salespersons and a broker employed or working for Defendants***

27 ***in a sales office. Defendants had knowledge that Kitec pipe fittings were inferior and should not have***

28 ***been installed at these homes per the specifications on the approved building plans. False or***

1 *misleading representations were made, and material facts were omitted, with intent to conceal*
2 *material facts known to Defendants with the intent to deprive Plaintiffs of their rights or property,*
3 *induce them to purchase homes or to otherwise injure them. Defendants, who were the builders,*
4 *developers and sellers of the Subject Property, had knowledge of facts materially affecting the value*
5 *and desirability of the Subject Properties which were known or accessible only to the builder,*
6 *development and/or seller and also knew that such facts were not known to, or within the reach of*
7 *the diligent attention and observation of Plaintiffs, and a duty to disclose them to Plaintiffs.*

8 81. *Notwithstanding their peculiar and exclusive knowledge of concealed, material defects*
9 *at the Subject Properties, Defendants further represented with intent to conceal material facts known*
10 *to Defendants with the intent to deprive Plaintiffs of their rights or property or to otherwise injure*
11 *them that the Subject Properties was substantially free of defects, safe, habitable for a reasonable*
12 *period, merchantable for a reasonable period and would be fit for normal use and occupancy for a*
13 *reasonable period without unreasonable or extraordinary expense. Defendants concealed materials*
14 *facts of the defective and inadequate Kitec piping systems with the intent to deprive Plaintiffs of their*
15 *rights or property, to induce them to purchase homes or to otherwise injure them, which in this case*
16 *was taking cash deposits and payments from Plaintiffs in exchange for the defective Subject*
17 *Properties, which amounted to obtaining money under false pretenses and fraudulent concealment*
18 *of defects.*

19 82. *Plaintiffs justifiably relied on the representations and omission of material facts by the*
20 *Defendants during the sale transaction and eventual transfer of the Subject Properties to them as*
21 *owners, and their damages resulted therefrom. Plaintiffs did not know about the defective Kitec*
22 *piping system, which violated the approved plans and specifications, and would not have purchased*
23 *the Subject Properties had they known of the material facts concealed by Defendants; and would have*
24 *taken action to pursue Defendants sooner had they known that the false representations were indeed*
25 *false.*

26 83. *Plaintiffs placed confidence in the position of Defendants as a builder, developer and*
27 *seller of real property and Defendants knew and were aware of said confidence placed in them, and*
28 *a duty to disclose defects existed.*

1 **84. *The acts, conduct or omissions as alleged herein constitute intentional, knowing,***
2 ***willful, oppressive, reckless or malicious acts/omissions by Defendants, such as to constitute***
3 ***despicable conduct, or oppression, fraud, conscious disregard or malice and such conduct legally***
4 ***entitling Plaintiffs to recover an award of punitive damages.***

5 **85. *Plaintiffs incorporate by reference, as if set forth herein, the particular statement of***
6 ***damages described in the prayer for relief.***

7 **86. *Plaintiffs have been required to retain the services of THE LAW OFFICES OF NEAL***
8 ***HYMAN to prosecute this matter, and is entitled to an award of attorney's fees based thereon.***

9 **87. *Plaintiffs are entitled to recover their attorney's fees, costs and expenses pursuant to***
10 ***NRS 40.600 et seq. and/or NRS 18.010.***

11 **88. *The monies recoverable for attorney's fees, costs and expenses under NRS 40.600 et***
12 ***seq. and/or NRS 18.010 include but are not limited to all efforts by THE LAW OFFICES OF NEAL***
13 ***HYMAN on behalf of the Plaintiffs prior to the filing of the initial Complaint.***

14 When the Motion was filed, Plaintiffs did not have the purchase agreement for Joseph and Ellen
15 DeRose. In Defendants' opposition/motion, they admit they do not have that purchase agreement.
16 Plaintiffs have been able to obtain the purchase agreement, and also seek to make fraud allegations on
17 behalf of Mr. and Mrs. Derose, as follows:

Joseph and Ellen DeRose	Purchase Agreement signed on 10/24/99; Sales Associate was Betty Davis. A Denise Berger signed the Purchase Agreement as a Sales Associate on 10/24/99; and James W. Bond was broker who signed Purchase Agreement on 10/30/99; closed escrow on 6/5/2000; Deed transferred by Scott A. Middleton, Vice President	During the purchase/sale transaction and up to closing, it was represented to Plaintiffs that they would receive a non-defective plumbing system as designed and specified on the approved plans; and a house without constructional defects; and Defendants omitted material facts from disclosures on which Plaintiff relied to her detriment and was induced into purchasing her defective home

27 See Exhibit 1, Para. 80.

1 **C. PLAINTIFFS’ FRAUD CLAIM IS SUPPORTED AND HAS A FACTUAL BASIS**

2 Even though Plaintiffs have pled a fraud claim with particularity such that Defendants “can
3 defend against the charge and not just deny that they have done anything wrong”, if the Court finds the
4 claims is not pled with particularity, there is a strong inference of fraud and factual basis for the fraud
5 claim to where the amended pleading should be allowed and discovery permitted to proceed. *Rocker,*
6 *supra*, 148 P.3d 703, 707-708, 122 Nev. Adv. Rep. 101.

7 According to Plaintiffs’ plumbing/mechanical expert, Harvey Kreitenberg, the term “cross-linked
8 polyethylene” is understood in the plumbing industry as “PEX” piping system. See **Exhibit 2**, Affidavit
9 of Harvey Kreitenberg. Contrary to Defendants’ bald assertions, Kitec is not just a type or brand of
10 “cross-linked polyethylene”. Unlike PEX, Kitec is its own “unique” stand-alone composite piping
11 system. Due to Kitec’s unique and exclusive features, it is Mr. Kreitenberg’s expert opinion that if
12 plumbing specifications call for Kitec, they will state “Kitec” – not the term "cross-linked polyethylene"
13 as used in Defendants’ approved plans and specifications. Moreover, Kitec was not listed among the
14 suitable or approved types of piping systems that were to be installed in the subject properties in
15 Defendants’ approved plans and specifications. Thus, Defendants knowingly, deliberately and willfully
16 violated their own approved plans by installing a defective Kitec piping system in lieu of the proper,
17 approved and designed piping systems. Further, Pulte provides “no” evidence that it obtained building
18 department approval from the Building Official for Henderson to deviate from the approved
19 plans/specifications, or that it re-submitted plumbing plans to the City of Henderson for approval of a
20 Kitec piping system. Defendants violated code by not following approved plans/specifications, and
21 certainly fell below the standard of care by violating them; and certainly cannot cure the violation and
22 breach of standard of care by asserting contract provisions with homeowners. That would violate public
23 policy if builders could have homeowners waive away code and safety compliance.

24 Defendants cite a contract provision in the Sales Agreements (Section 3.3) for the argument that
25 Plaintiffs agreed to alternative construction materials. The contract provision in Section 3.3 of the Sales
26 Agreements is inapplicable based on the plain language of the provision which states “...Accordingly,
27 we reserve the right to make changes in the plans, specifications, and materials for the Home as and
28 when we deem necessary or appropriate, **so long as such changes do not violate applicable federal,**

1 **state or local law, and the Home has substantially equivalent or greater value with the changes.”**
2 (emphasis added). Not only did the plans (those submitted to and approved by the City of Henderson)
3 call for a PEX piping system, which itself is a more expensive and superior system than Kitec, but the
4 market value of Plaintiffs’ homes was greatly reduced by the use of Kitec. The use of Kitec by
5 Defendants instead of PEX devalued Plaintiffs’ homes due to its inferior nature and failure, and its use
6 was never disclosed to Plaintiffs, which is fraud. Defendants cannot contend they did not know what
7 their own plans specified, so their conduct was deliberate and intentional. The question is not whether
8 Defendants intended to harm Plaintiffs. That is specific intent for criminal law. Under NRS 42.001 and
9 NRS 4.2005, and *Countrywide Home Loans, Inc. v. Thitchener*, 192 P.3d 243, 252 (Nev. 2008), all
10 Plaintiffs must do is show that Defendants engaged in some intentional, deliberate or knowing conduct,
11 which caused harm or property damage.

12 For the same reasons set forth in Plaintiffs’ Opposition to Defendants’ Motion for Partial
13 Summary Judgment below, Section 3.3 of the Sales Agreement is inconspicuous, unconscionable and
14 violates due process. That provision is even worse than the purported waiver of warranties provisions
15 (entitled warranties) as it is at the bottom of page 13, carries over to page 14, is all in normal type
16 without an capital letters, bold, underlining or italics, in the same size font is not initialed and has the
17 misleading title “No Custom Home Sales,” which says nothing about agreeing to substitute
18 different/inferior plumbing systems with ones specified on the approved plans. The points and
19 authorities cited in the Opposition to Defendants’ Counter-Motion for Partial Summary Judgment are
20 incorporated by reference as though set forth in full herein. Even if the Court were to consider this
21 provision to find that Defendants were permitted to substitute a Kitec pipe system instead of a PEX pipe
22 system, the provision is unconscionable, inconspicuous and violates due process, and cannot be
23 enforced. It is also part of an adhesion contract where Plaintiffs had no bargaining power and were
24 forced to sign the Sales Agreement or find another house.

25 According to Plaintiffs’ plumbing/mechanical expert, Mr. Kreitenberg, within the
26 plumbing/piping industry the term "cross-linked polyethylene" refers to a stand alone “PEX” piping
27 system. Exhibit 2, Para. 3. When Del Webb Communities, Inc. (“Del Webb”) plumbing specifications
28 in the approved plans calling for installing “cross-linked polyethylene,” the approved plans referred to

1 the installation of a stand alone “PEX” piping system – not a Kitec piping system like there is installed
2 in the homeowners’ houses in this case. *Id.* Installing a Kitec plumbing system violated the approved
3 plans/specifications. *Id.* Unlike PEX, Kitec is a "unique" composite piping system made up of an
4 aluminum tubing laminated between interior and exterior layers of plastic. *Id.* PEX, on the other hand,
5 is a stand alone piping system and its fittings are not compatible with Kitec piping systems. *Id.* When
6 a PEX piping system is installed, the homeowner has flexibility to purchase and install connectors made
7 of varying materials and competing manufacturers if a connector fails. *Id.* at Para. 4. In contrast, when
8 a Kitec piping system is installed, the homeowner is required to use Kitec brand yellow brass connector
9 components. *Id.* In this case, the Kitec brand yellow brass connectors are the components that are failing
10 and defective/deficient in the homeowners’ plumbing systems in this case. *Id.*

11 In the Affidavit of Mr. Kreitenberg, at Paragraph 5, he testifies:

12 In Affiant’s expert opinion, **Del Webb knew, or should have known that the Kitec
13 yellow brass connectors were prone to failure.**

14 Exhibit 2, Para. 5.

15 Even aside from Mr. Kreitenberg’s expert opinion, Plaintiffs are informed and believe that
16 yellow brass fittings/connectors similar to the Kitec ones used at Plaintiffs’ homes, e.g., at Defendants’
17 earlier development in Sun City Summerlin in Las Vegas (prior to 2001 and consisting of thousands of
18 houses), had failed in similar houses with similar Kitec plumbing systems; and Defendants knew, or
19 should have known through the use of reasonable diligence, that Kitec yellow brass fittings (and similar
20 fittings) being installed in homes constructed by Pulte throughout Clark County would be prone to
21 failure and that the Kitec system was inadequate for hard water conditions in Clark County due to its
22 hard, high sulfate content when it designed, built and sold these homes and earlier ones throughout Clark
23 County. If given the opportunity to conduct discovery on fraud, Plaintiffs anticipate gathering factual
24 information and evidence to support this position. That would clearly show Pulte was on notice of Kitec
25 failure and its conscious disregard for Plaintiffs and their rights/property..

26 This case is still in the early stages of discovery. No depositions have proceeded, and key
27 witnesses identified in the proposed Amended Complaint need to be deposed to prove the fraud claim.
28 Also, Pulte is in exclusive possession of information and documents that will help prove Plaintiffs’ fraud
claim. Nevertheless, Plaintiffs contend there is a sufficient factual basis for a fraud claim which will be

1 supported by further discovery. If this amendment is not permitted, Plaintiffs will not be able to conduct
2 the discovery needed to obtain the facts and documents to prove fraud. That would be substantially
3 unfair to Plaintiffs as they are entitled to bring “all” of their claims in this action, and will be barred from
4 doing so in another, separate action. There will be no prejudice or delay, and this Motion is not brought
5 for improper purpose, such as to harass or cause delay. Rather, the plan violation was not learned until
6 after the initial Complaint was filed and after Pulte produced various specifications and plans, some just
7 as recently as a month ago. The trial is set for September 7, 2010, so there is plenty of time for
8 discovery, and an extension of the October 19, 2009, discovery deadline if necessary.

9 Since Nevada is a notice pleading state, Pulte was on notice that Plaintiffs would amend to add
10 these causes of action because (1) it knew that it violated the approved plans and specifications, and (2)
11 the initial Complaint alleged that Pulte “knew” of the defects, as follows:

12 28. Defendants **knew** or should have known **of the defects, deficiencies and**
13 **property** damage at the Subject Properties, including but not limited to the defective and
14 deficient Kitec pipe fittings and related systems, assemblies, parts and components, and
15 failed to take appropriate steps to repair the problems, and **failed to disclose the**
16 **existence of the defects, deficiencies and property damage to Plaintiffs.**

17 * * *

18 55. Plaintiffs are informed and believe, and thereon allege, that Defendants, and each
19 of them, in breach of said duty, negligently, carelessly, **wrongfully, recklessly,**
20 **knowingly, wilfully and intentionally** failed to exercise reasonable care in the
21 investigation, design, inspection, planning, engineering, supervision, construction,
22 production, manufacture, development, preparation, marketing, distributing, supply,
23 transfer, **disclosure and/or sale of the Subject Properties**, thereby breaching the duty
24 owed to Plaintiffs.

25 [Emphasis added]

26 In the Prayer for Relief, Plaintiffs alleged:

27 6. For such further relief as is necessary, including **punitive damages**, to satisfy and
28 punish Defendant’s violations of NRS 40.600 et seq., including equitable and monetary
relief;

[Emphasis added]

None of the other claims Plaintiffs seek leave to add (misrepresentation, failure to disclose
defects and breach of the covenant of good faith and fair dealing) are subject to the heightened pleading
requirement for fraud claims. As such, leave shall be freely given so Plaintiffs can add those claims.

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///

1 Since leave to amend shall be freely given per NRCP 15(a), and justice so requires the
2 amendment, Plaintiffs respectfully request that the Court grant this Motion and permit Plaintiffs to file
3 the attached proposed First Amended Complaint. No substantial or unfair prejudice will occur to any
4 party, there is no undue delay and this amendment is not sought for the purposes of delay or improper
5 purpose. This case is young in discovery and there have been no depositions. There are over six months
6 of discovery remaining and trial is not until September 2010, almost a year after the discovery cut-off.
7 Thus, if an extension of the discovery cut-off is needed, it is possible to avoid any prejudice to Pulte that
8 amendment may cause.

9 **II.**

10 **OPPOSITION TO DEFENDANTS' COUNTER-MOTION FOR PARTIAL SUMMARY**
11 **JUDGMENT ON PLAINTIFFS' FIRST CLAIM FOR RELIEF, TO STRIKE PLAINTIFFS'**
12 **PRAYER FOR PUNITIVE DAMAGES, AND FOR SUMMARY JUDGMENT IN FAVOR OF**
13 **DEFENDANT PNI, INC. dba PULTE HOMES OF NEVADA**

14 COME NOW Plaintiffs, by and through their counsel of record, NEAL K. HYMAN, ESQ. and
15 RHONDA R. LONG, ESQ. of THE LAW OFFICES OF NEAL HYMAN, and hereby file their
16 OPPOSITION TO DEFENDANTS' COUNTER-MOTION FOR PARTIAL SUMMARY JUDGMENT
17 ON PLAINTIFFS' FIRST CLAIM FOR RELIEF, TO STRIKE PLAINTIFFS' PRAYER FOR
18 PUNITIVE DAMAGES, AND FOR SUMMARY JUDGMENT IN FAVOR OF DEFENDANT PNI,
19 INC. dba PULTE HOMES OF NEVADA.

20 The Opposition is made and based on the following Memorandum of Points and Authorities,
21 the exhibits attached thereto, the affidavits in support thereof, the papers and pleadings on file herein
22 and any evidence or oral argument heard or permitted by the Court at the hearing on this matter.

23 DATED this 14th day of April, 2009.

24 **THE LAW OFFICES OF NEAL HYMAN**

25 By: /s/ Neal K. Hyman

26 NEAL K. HYMAN, ESQ.
27 Nevada Bar No. 005998
28 RHONDA R. LONG, ESQ.
Nevada Bar No. 010921
2441 W. Horizon Ridge Pkwy., Suite 120
Henderson, NV 89052
Attorneys for Plaintiffs

1 For the sake of brevity and since Defendants' filed a counter-motion, the Fact and Procedural
2 Posture Sections of Plaintiffs' Motion for Leave to Amend Complaint are incorporated by reference as
3 though set forth in full herein.

4 **A. STANDARD OF REVIEW – SUMMARY JUDGMENT**

5 After the pleadings are closed but within such time as not to delay the trial, any party may move
6 for judgment on the pleadings. NRCP 12(c). If, on a motion for judgment on the pleadings, matters
7 outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one
8 for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable
9 opportunity to present all material made pertinent to such a motion by Rule 56. *Id.*

10 **Motions for summary judgment and responses thereto shall include a concise statement**
11 **setting forth each fact material to the disposition of the motion which the party claims is or is not**
12 **genuinely in issue, citing the particular portions of any pleading, affidavit, deposition,**
13 **interrogatory, answer, admission, or other evidence upon which the deposition, answer to**
14 **interrogatories, and admissions on file, together with the affidavits, if any, show there is no**
15 **genuine issue as to any material fact and that the moving party is entitled to a judgment as a**
16 **matter of law.** NRCP 56(c) (emphasis added).

17 Should it appear from the affidavits of a party opposing the motion that the party cannot for
18 reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse
19 the application for summary judgment or may order a continuance to permit affidavits to be obtained
20 or depositions to be taken or discovery to be had or may make such other order as is just. NRCP 56(f).

21 The purpose of Rule 56 is not to cut litigants off from their right of trial by jury if they really
22 have issues to try. *Short v. Hotel Riviera, Inc.* 79 Nev. 94, 378 P.2d 979 (1963). Summary judgment
23 may not be used as a shortcut to the resolving of disputes upon facts material to the determination of the
24 legal rights of the parties. *Parman v. Petricciani*, 70 Nev. 427, 272 P.2d 492 (1954).

25 Summary judgment is only proper when the moving party introduces admissible evidence and
26 argument in their moving papers demonstrating that there are no genuine issue as to any material fact
27 against specific parties related to specific claims, and therefore judgment as a matter of law is warranted.
28 NRCP 56(c). *See also Butler v. Bogdanovich*, 101 Nev. 449, 451 (1985). The burden of introducing

1 admissible evidence demonstrating the absence of any triable issue of fact remains with the moving
2 party. *Id.* The court must construe all pleadings and evidence in a light most favorable to the party
3 against whom summary judgment is sought, and all factual allegations, evidence and reasonable
4 inferences therefrom which favor the party opposing the Motion must be presumed by the court to be
5 correct. *Butler, supra; NGA # 2 Ltd. Liability Co. v. Rains*, 113 Nev. 1151 (1997).

6 District Courts must take great care in granting summary judgment. *Johnson v. Steel, Inc.*, 100
7 Nev. 181, 678 P.2d 676 (1984). District Court may not simply dispense with the adversary process when
8 it senses the equities of the case are obvious. *Sierra Nev. Stagelines v. Rossi*, 111 Nev. 360, 892 P.2d
9 592 (1995).

10 While the pleadings and other proof must be construed in a light most favorable to the
11 nonmoving party, that party bears the burden to "do more than simply show that there is some
12 metaphysical doubt" as to the operative facts in order to avoid summary judgment being entered in the
13 moving party's favor. *Wood v. Safeway, Inc.*, 121 Nev. Adv. Rep. 73, 121 P.3d 1026 (2005). The
14 nonmoving party "must, by affidavit or otherwise, set forth specific facts demonstrating the existence
15 of a genuine issue for trial or have summary judgment entered against him." *Id.* The nonmoving party
16 "is not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture." *Id.*

17 **B. CONCISE STATEMENT OF DISPUTED FACTS**

18 While there have been no depositions and minimal discovery in this case, Plaintiffs provide the
19 following Concise Statement of Disputed Facts for the Court's ease of reference (unlike Defendants
20 which provided none):

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DISPUTED MATERIAL FACT	CITATION/AUTHORITY
Defendants filed an improper counter-motion that is unrelated to Plaintiffs' Motion for Leave to Amend so that Plaintiffs would have less time to respond and so they would get a quicker hearing date without seeking an order to shorten time	Defendants' Counter-Motion for Partial Summary Judgment; EDCR 2.20(d)
Defendants' did not provide the required Concise Statement of Disputed Facts in their Motion for Partial Summary Judgment	NRCP 56(c)
The Sales Agreements attached to Defendants' Motion for Partial Summary Judgment are not authenticated nor admissible or competent evidence for the Court to consider	Motion for Partial Summary Judgment (Sales Agreements attached as exhibits); NRCP 56(c)
Harvey Kreitenberg, Plaintiffs' plumbing/mechanical expert, entirely disagrees with Defendants' mechanical expert that a Kitec piping system was specified in the approved plans and specifications, and Mr. Kreitenberg opines that Defendants knew, or should have known through the use of reasonable diligence, that the Kitec yellow brass connectors were prone to failure	See, Affidavit of Mr. Kreitenberg attached as Exhibit 2 (Mr. Stremel's affidavit is not in support of the Counter-Motion for Summary Judgment and must not be considered)

1 While Defendants contend that their 1-2 year
2 warranties expired and Plaintiffs waived all
3 implied warranties, implied warranties under
4 NRS Chapter 116 were not waived as they were
5 not specifically identified (rather than a general
6 waiver) by defect and were not waived in a
7 separate document signed by Plaintiffs, in a
8 conspicuous and conscionable waiver, and are
9 not excluded by expressions of disclaimer, such
10 as "as is," "with all faults," or other language
11 that in common understanding calls the
12 purchaser's attention to the exclusion of
13 warranties; and implied warranties under NRS
14 Chapter 40 and common law were not waived;
15 and constructional defects were not disclosed
16 to owners before their purchase of the residences,
17 and the disclosures were not provided in
18 language that is understandable and written in
19 underlined and boldfaced type with capital
20 letters. Also, it is an issue of fact whether
21 statutes of limitation apply

22 The Affidavit of Plaintiff Joseph DeRose
23 (Exhibit 8) shows that Defendants
24 acknowledged and processed warranty claims
25 years after the 1-2 year express warranties
26 lapsed, and as recently as 2008-2009. This
27 evidence shows that Defendants' position now
28 that Plaintiffs all waived their implied
warranties is baseless and they are now
estopped from asserting such a position

Sales Agreements attached to Defendants'
Motion for Partial Summary Judgment; NRS
116.4115(1) and (2); NRS 40.640(5);
forthcoming deposition testimony of Plaintiffs
and Persons Most Knowledgeable for
Defendants; *Radaker v. Scott*, 109 Nev. 653;
855 P. 2d 1037(1993), *Daniel Mann, Johnson
& Mendenhall v. Hilton Hotels Corp.*, 98 Nev.
113 (1992), *Olson v. Richard*, 120 Nev. 240, 89
P.3d 31 (2004), *Farmers v. Young* 108 Nev.
328; 832 P.2d 376; 1992 Nev. LEXIS 68 (1992)
citing to *Steven v. Fidelity and Casualty Co. of
New York*, 377 P.2d 284 (Cal. 1962), *Graham
v. Scissor-Tail, Inc.*, 623 P. 2d 165, 172-173
(Cal. 1981), *Stremmel v. IDS Leasing* 89 Nev.
414; 514 P.2d 654 (1973) citing to Uniform
Commercial Code '2-3-2, Comment 1; *Kugler
v. Romain*, 279 A.2d 640 (N.J. 1971); *Central
Ohio Co-op Milk Producers, Inc. v. Rowland*,
281 NE.2d 42 (Ohio App. 1972); *Division of
Triple T Serv., Inc. v. Mobil Oil Corp.*, 304
N.Y.S. 2d 191 (Sup. Ct. 1969), aff'd 311
N.Y.S. 2d 961 (App. 1970), *Villa Milano
Homeowners Association v. II Davorge*, 84 Cal.
App. 4th 819 (2000) citing to *Madden v. Kaiser
Foundation Hospitals*. 17 Cal.3d 699, 711
(1976), *D.R. Horton, Inc. v. Green*, 120 Nev.
549 (Nev. 2004), *Burch v. Second Judicial
District Court*, 118 Nev. 438, 49 P.3d 647
(2002), *Mackintosh v. Cal. Fed. Savings &
Loan Association*, 113 Nev. 393, 935 P.2d 1154
(1997), *Gray v. Zurich Insurance Co.*, 65
Cal.2d 263, 270 [54 Cal.Rptr. 104, 419 P.2d
168], quoting *Kessler, Contracts of Adhesion,
Some Thoughts about Freedom of Contracts*,
supra, 43 Colum.L.Rev. 629, 637, *Henderson,
Contractual Problems in the Enforcement of
Agreements to Arbitrate Medical Malpractice*,
supra, 58 Va.L.Rev. 947, 991-992; NRS
116.4114, NRS 116.4116; Affidavit of Joseph
DeRose (**Exhibit 8**)

<p>1 It is disputed that PN II, Inc. had no 2 involvement in this project; a fictitious name 3 filing was made by Del Webb wherein it was 4 doing business as PN II, Inc./Pulte Homes; Del 5 Webb was using letter head which referred to 6 Pulte Homes of Nevada and its website and 7 address; and Plaintiffs are informed and believe 8 that Del Webb's assets/liabilities were 9 purchased by PN II, Inc., including its warranty 10 obligations owed to Plaintiffs, and PN II, Inc.'s 11 assets and/or insurance will be used to fund a 12 settlement or pay a judgment</p>	<p>Printout of Clark County Fictitious Firm Name Filings by Del Webb and PN II, Inc. (Exhibit 3) and Letter from Del Webb/Pulte to Susan McIver dated October 20, 2006 (Exhibit 4)</p>
<p>8 It is disputed whether Defendants complied 9 with Chapter 40 by making a woefully low and 10 unsupported monetary offer of \$7,800.00 to 11 each homeowner, with only \$5,700.00 going to 12 repair costs and \$2,100.00 being unidentified, 13 whether Defendants mediated in good faith; 14 whether Plaintiffs may seek punitive or other 15 damages outside of NRS 40.655 due to 16 Defendants' failure to comply with Chapter 40; 17 whether personal injury actions are excepted 18 from the damages limitation and other 19 provisions of Chapter 40; and whether 20 Defendants' failure to comply with NRS 21 Chapter 116 permits Plaintiffs to recover 22 punitive damages; also, as stated in Mr. 23 Kreitenberg's Affidavit, he opines that 24 Defendants knew, or should have known 25 through the use of reasonable diligence, that the 26 Kitec yellow brass connectors were prone of 27 failure</p>	<p>See exemplar Chapter 40 offer of \$7,800.00 from Defendants (Exhibit 5) and Letter from Jason Williams clarifying that \$5,700.00 is only amount offered for repairs (Exhibit 6), NRS 40.655; NRS 40.650(2); NRS 40.635(1) and (4); <i>Countrywide Home Loans, Inc. v. Thitchener</i>, 192 P.3d 243 (2008); NRS 42.001, NRS 42.005; NRS 116.4117(3); Affidavit of Harvey Kreitenberg (Exhibit 2, Para. 5)</p>
<p>18 More discovery is needed to obtain evidence to 19 support Plaintiffs' fraud claim</p>	<p>Affidavit of Neal K. Hyman, Exhibit 7; NRCP 56(f)</p>

21 **C. ARGUMENT**

22 **1. THE COUNTER-MOTION HAS PROCEDURAL DEFICIENCIES WHICH
23 JUSTIFY ITS DENIAL**

24 EDCR 2.20(d) provides:

25 “ An opposition to a motion *which contains a motion related to the*
26 *same subject matter will be considered as a counter motion*. A counter-
27 motion will be heard and decided at the same time set for the hearing of
28 the original motion and no separate notice of motion is required.”
(emphasis added).

NRCP 56 provides in pertinent part:

".... Motions for summary judgment and responses thereto **shall include**

1 **a concise statement setting forth each fact material to the disposition**
2 **of the motion which the party claims is or is not genuinely in issue,**
3 citing the particular portions of any pleading, affidavit, deposition,
4 interrogatory, answer, admission, or other evidence upon which the
5 deposition, answer to interrogatories, and admissions on file, together
6 with the affidavits, if any, show there is no genuine issue as to any
7 material fact and that the moving party is entitled to a judgment as a
8 matter of law. NRCP 56(c) (emphasis added)."

9 Defendants' Counter-Motion is entirely unrelated to Plaintiffs' Motion for Leave to Amend
10 Complaint, and was filed to give Plaintiffs less time to oppose it. Plaintiffs in their Motion for Leave
11 to Amend Complaint seek to add claims for fraud, other torts, to add the true names of parties and to
12 remove some non-Kitec defect allegations. This Counter-Motion for Partial Summary Judgment is
13 completely unrelated to the issues raised in Plaintiffs' motion to leave to amend. This motion deals with
14 Plaintiffs claim for Breach of Implied Warranties, the naming of PNII as a Defendant and Punitive
15 Damages. Defendants' motion is an improper counter-motion as none of these issues were brought up
16 in Plaintiffs' motion. Since these issues are not related to the same subject matter as the Motion for
17 Leave to Amend Complaint, the Motion for Partial Summary Judgment (couched as a counter-motion)
18 should have had a separate notice of motion and should be heard separately. It is prejudicial and unfair
19 to Plaintiffs to have to respond to a lengthy and unrelated Motion for Summary Judgment at the same
20 time Plaintiffs were preparing their Reply in Support of Motion to Leave to Amend.

21 Moreover, Defendants have not included the required Concise Statement of Undisputed Facts
22 as required by NRCP 56(c) (the purpose of this requirement is so the undisputed facts are clearly laid
23 out for the Court, to make its job easier, and so the Court can see if there is merit to a motion for
24 summary judgment without issues being confused). In addition, Defendants fail to cite "the particular
25 portions of any pleading, affidavit, deposition, interrogatory, answer, admission or other evidence" upon
26 which they rely which would support granting a motion for summary judgment – this is required by
27 NRCP 56(c). Defendants attach as "one" exhibit nearly **700 pages of sales agreements** which are all
28 hearsay documents offered for the truth of the matter asserted, and are inadmissible. The attached
 hearsay documents are not authenticated and lack foundation. Defendants have the burden to show no
 genuine issues of material fact by competent and admissible evidence. NRCP 56(c). Therefore, for all
 of the aforementioned reasons, the Motion for Partial Summary Judgment is entirely devoid of
 competent or admissible evidence as required by NRCP 56(c) and should be denied in its entirety.

1 **2. PLAINTIFFS' CLAIM FOR BREACH OF IMPLIED WARRANTIES OF**
2 **FITNESS, MERCHANTABILITY, QUALITY AND HABITABILITY IS**
3 **SUPPORTED BY LAW AND THERE ARE GENUINE ISSUES AS TO**
4 **MATERIAL FACT IN DISPUTE**

5 **a. Plaintiffs' Claim for Breach of Implied Warranties of Fitness,**
6 **Merchantability, Quality and Habitability is Proper and Supported by**
7 **Evidence**

8 If the Court decides to forgive Defendants' violation of EDCR 2.20(d) by filing an improper and
9 unrelated counter-motion, which it should not, and if the Court decides to forgive Defendants' failure
10 to provide a Concise Statement of Undisputed Facts as required by NRCF 56(c), then out of an
11 abundance of caution Plaintiffs address the merits of the counter-motion.

12 Homeowners in common interest communities have a statutory right to implied warranties of
13 quality.

14 NRS 116.4114 Implied warranties of quality:

15 1. *A declarant and any dealer warrant that a unit will be in at*
16 *least as good condition at the earlier of the time of the conveyance or*
17 *delivery of possession as it was at the time of contracting, reasonable*
18 *wear and tear excepted.*

19 2. A declarant and any dealer impliedly warrant that a unit and
20 the common elements in the common-interest community are suitable for
21 the ordinary uses of real estate of its type and that any improvements
22 made or contracted for by him, or made by any person before the creation
23 of the common-interest community, will be:

24 (a) Free from defective materials; and

25 (b) Constructed in accordance with applicable law, according to
26 sound standards of engineering and construction, and in a workmanlike
27 manner.

28 3. In addition, a declarant and any dealer warrant to a purchaser
of a unit that may be used for residential use that an existing use,
continuation of which is contemplated by the parties, does not violate
applicable law at the earlier of the time of conveyance or delivery of
possession.

**4. Warranties imposed by this section may be excluded or
modified as specified in NRS 116.4115.**

5. For purposes of this section, improvements made or contracted
for by an affiliate of a declarant are made or contracted for by the
declarant.

6. Any conveyance of a unit transfers to the purchaser all of the
declarant's implied warranties of quality.

[Emphasis added]

1 NRS 116.4116 Statute of limitations for warranties.

2 **1. A judicial proceeding for breach of any obligation arising under**
3 **NRS 116.4113 or 116.4114 must be commenced within 6 years after the**
4 **cause of action accrues, but the parties may agree to reduce the period**
5 **of limitation to not less than 2 years. With respect to a unit that may be**
6 **occupied for residential use, an agreement to reduce the period of**
7 **limitation must be evidenced by a separate instrument executed by the**
8 **purchaser.**

9 2. Subject to subsection 3, a cause of action for breach of warranty of
10 quality, regardless of the purchaser's lack of knowledge of the breach,
11 accrues:

12 (a) As to a unit, at the time the purchaser to whom the warranty is
13 first made enters into possession if a possessory interest was conveyed or
14 at the time of acceptance of the instrument of conveyance if a
15 nonpossessory interest was conveyed; and

16 (b) As to each common element, at the time the common element is
17 completed or, if later, as to:

18 (1) A common element that may be added to the common-interest
19 community or portion thereof, at the time the first unit therein is
20 conveyed to a bona fide purchaser; or

21 (2) A common element within any other portion of the
22 common-interest community, at the time the first unit is conveyed to a
23 purchaser in good faith.

24 3. If a warranty of quality explicitly extends to future performance or
25 duration of any improvement or component of the common-interest
26 community, the cause of action accrues at the time the breach is
27 discovered or at the end of the period for which the warranty explicitly
28 extends, whichever is earlier.

29 Nevada case law also provides homeowners for implied warranties of quality and habitability.
30 In *Radaker v. Scott*, 109 Nev. 653; 855 P. 2d 1037(1993), the Court recognized the implied warranty
31 of habitability as applicable to the sale of homes. Also, in *Daniel Mann, Johnson & Mendenhall v.*
32 *Hilton Hotels Corp.*, 98 Nev. 113 (1992), the Nevada Supreme Court upheld the District Court's giving
33 of an instruction that the defendant surveyor's liability was founded upon an implied duty to perform in
34 a workmanlike manner. *Id.* at 114-115. Thus, the courts in Nevada have allowed implied warranty claims
35 to homeowners. An implied warranty of workmanlike manner, including a duty to perform to a
36 reasonably skillful standard, exists in Nevada for homeowners. *Olson v. Richard*, 120 Nev. 240, 89 P.3d
37 31 (2004).

38 Defendants incorrectly assert that Plaintiffs' Implied Warranty of Merchantability claim arises
39 from statutory authority found in the Uniform Commercial Code ("UCC") and in NRS Chapter 104.
40 Plaintiffs never reference the UCC code or that statute. Plaintiffs' claim arises from the implied

1 warranties found in NRS 116.4114 and Nevada case law. Plaintiffs served Chapter 40 Notices and filed
2 the Complaint within the six year statute of limitations of provided 116.4116(1). The two year statute
3 of limitations in this section does not apply in this case since there was no separate instrument executed
4 by the homeowners limiting the statute of limitations, and there is no specific disclaimer of Chapter 116
5 implied warranties including a specific disclaimer for each defect disclaimed. Even if it did, there would
6 be a genuine issue as to material fact whether it lapsed and when the breach of warranty was discovered.
7 Thus, Defendants' discussion that implied warranties only apply to the sale of goods is irrelevant to the
8 instant case. Plaintiffs as homeowners have legal authority to bring a claim for breach of implied
9 warranties of fitness, merchantability, quality and habitability. Ironically, Defendants claim that UCC
10 warranties do not apply to Plaintiffs' houses, but then assert UCC warranty disclaimer provisions.
11 Defendants cannot have it both ways. Which is it? Does the UCC apply or not? It should be noted that
12 a Kitec plumbing system, and any plumbing system for that matter, is an identifiable product
13 manufactured by a company, in this case Kitec. As such, it is a product that can be separately identified
14 inside a house unlike other integrated aspects of construction, e.g., framing, drywall, roofs and the like.

15 **b. Defendants' Purported Waiver of Warranty Provision is Unenforceable**
16 **because it is Unconscionable, Violates Due Process and Violates NRS**
Chapters 116 and 40

17 The contract at issue is a standardized "adhesion" purchase agreement created by Defendants
18 which they provide to all customers in hopes that they will sign it without knowing or understanding the
19 one- sided adhesion terms contained within. In fact, when these homes were sold between 2001-2003,
20 the market was hot, demand was high, supply was not great and builders could put anything they wanted
21 in purchase agreements. If a homeowner did not like it, a hundred others were waiting in line to sign.
22 By definition, an adhesion contract is a standardized form contract written entirely by a party with
23 superior bargaining power. The weaker party confronts a "take it or leave it" proposition, under which
24 the only alternative to complete adherence is outright rejection. *Farmers v. Young* 108 Nev. 328; 832
25 P.2d 376; 1992 Nev. LEXIS 68 (1992) citing to *Steven v. Fidelity and Casualty Co. of New York*, 377
26 P.2d 284 (Cal. 1962). **An adhesion contract is unenforceable if it falls outside the reasonable**
27 **expectations of the weaker or "adhering" party and is unduly oppressive.** *Graham v. Scissor-Tail,*
28 *Inc.*, 623 P. 2d 165, 172-173 (Cal. 1981). Similarly, a contract is unconscionable only when the
clauses of the contract and the circumstances existing at the time of the execution of the contract are so

1 one-sided as to oppress or unfairly surprise an innocent party. *Stremmel v. IDS Leasing* 89 Nev. 414;
2 514 P.2d 654 (1973) citing to Uniform Commercial Code '2-3-2, Comment 1; *Kugler v. Romain*, 279
3 A.2d 640 (N.J. 1971); *Central Ohio Co-op Milk Producers, Inc. v. Rowland*, 281 NE.2d 42 (Ohio App.
4 1972); *Division of Triple T Serv., Inc. v. Mobil Oil Corp.*, 304 N.Y.S. 2d 191 (Sup. Ct. 1969), aff'd 311
5 N.Y.S. 2d 961 (App. 1970).

6 In *Villa Milano Homeowners Association v. II Davorge*, 84 Cal. App. 4th 819 (2000) citing to
7 *Madden v. Kaiser Foundation Hospitals*, 17 Cal.3d 699, 711 (1976), the Court concluded that "adhesion
8 contracts are based upon an imbalance in bargaining power, but not necessarily one that 'requires' the
9 weaker party to accept the contract. In short, even where a weaker party has the option to go elsewhere,
10 the contract can still be one of adhesion." *Id.*

11 **For a disclaimer, "as is" clause or any other contractual provision to be conscionable, it**
12 **must meet procedural due process and substantive due process standards.** *D.R. Horton, Inc. v.*
13 *Green*, 120 Nev. 549 (Nev. 2004). See also, *Burch v. Second Judicial District Court*, 118 Nev. 438, 49
14 P.3d 647 (2002). Less evidence of substantive unconscionability is required in cases involving great
15 procedural unconscionability. *Id.* at 1162. A clause is procedurally unconscionable when a party lacks
16 a meaningful opportunity to agree to the clause terms either because of unequal bargaining power, as
17 in an adhesion contract, or because the clause and its effects are not readily ascertainable upon a review
18 of the contract. *Id.* Procedural unconscionability often involves the use of fine print or complicated,
19 incomplete or misleading language that fails to inform a reasonable person of the contractual language's
20 consequences. *Id.* The Supreme Court in *Green*, supra, found an arbitration clause procedurally
21 unconscionable because it was inconspicuous, was downplayed by the builder's representative and failed
22 to adequately advise an average person that important rights were being waived by agreeing to the
23 provision. *Id.* at 1164. Substantive unconscionability can be established by showing a contract
24 provision is one-sided. *Id.* at 1165.

25 A duty to disclose defects may exist in a purchase transaction of real property if one party placed
26 confidence in the other because of the party's position and the other party knew of that confidence.
27 *Mackintosh v. Cal. Fed. Savings & Loan Association*, 113 Nev. 393, 935 P.2d 1154 (1997). In addition,
28 **most states do not permit an "as is" or "disclaimer" clauses to shield a seller who has fraudulently**
misrepresented the condition of property or who has intentionally concealed known defects.

1 *Mackintosh, supra* (citations omitted). A person who makes affirmative false representations to
2 consummate a sale should not be able to shield himself from liability by hiding behind the “as is”
3 contractual language in a sales contract. *Id.*

4 NRS 40.640 provides in pertinent part:

5 In a claim to recover damages resulting from a constructional defect, **a contractor** is
6 liable for his acts or omissions or the acts or omissions of his agents, employees or
subcontractors and **is not liable for any damages caused by:**

- 7 1. The acts or omissions of a person other than the contractor or his agent, employee or
subcontractor;
- 8 2. The failure of a person other than the contractor or his agent, employee or
9 subcontractor to take reasonable action to reduce the damages or maintain the residence;
- 10 3. Normal wear, tear or deterioration;
- 11 4. Normal shrinkage, swelling, expansion or settlement; or
- 12 **5. Any constructional defect disclosed to an owner before his purchase of the
residence, if the disclosure was provided in language that is understandable and
was written in underlined and boldfaced type with capital letters.**

13 NRS 116.4115 provides:

14 Exclusion or modification of warranties of quality:

15 1. Except as limited by subsection 2 with respect to a purchaser of a unit that may be
used for residential use, implied warranties of quality:

16 (a) May be excluded or modified by agreement of the parties; and

17 (b) Are excluded by expression of disclaimer, such as "as is," "with all faults,"
18 or other language that in common understanding calls the purchaser's attention
to the exclusion of warranties.

19 2. With respect to a purchaser of a unit that may be occupied for residential use, no
20 general disclaimer of implied warranties of quality is effective, but a declarant and any
21 dealer may disclaim liability in an instrument signed by the purchaser for a specified
defect or specified failure to comply with applicable law, if the defect or failure entered
into and became a part of the basis of the bargain.

22 [Emphasis added]

23 In the instant case, there is a definite imbalance in bargaining power. The stronger party, Del
24 Webb, drafted the contract, and the weaker unsophisticated parties, senior citizen/retiree homeowners
25 (Plaintiffs), believed they had no opportunity or ability to negotiate the terms of the contract. In
26 essence, Plaintiffs believed that they had no choice but to sign the agreement or lose their dream
27 retirement homes. The fact is that the average home buyer is unaware that he or she can look elsewhere
28 for a more favorable contract because they are told by the builder that the purchase agreement is a
standardized agreement that everybody signs. Enforceability of adhesion contracts depends upon

1 whether the terms of which the adherent was unaware are beyond the reasonable expectations of an
2 ordinary person or are oppressive or unconscionable. In dealing with standardized contracts, courts have
3 to determine what the weaker contracting party could legitimately expect by way of services according
4 to the enterpriser's calling and to what extent the stronger party disappointed reasonable expectations
5 based on the typical life situation. *Gray v. Zurich Insurance Co.*, 65 Cal.2d 263, 270 [54 Cal.Rptr. 104,
6 419 P.2d 168], quoting *Kessler, Contracts of Adhesion, Some Thoughts about Freedom of Contracts*,
7 *supra*, 43 Colum.L.Rev. 629, 637. See also *Henderson, Contractual Problems in the Enforcement of*
8 *Agreements to Arbitrate Medical Malpractice*, *supra*, 58 Va.L.Rev. 947, 991-992.

9 It is beyond the reasonable expectations of the ordinary home purchaser, including Plaintiffs, that
10 the builder of their home, Del Webb, would sneakily attempt to strip them of all of their rights allowable
11 by law in the most oppressive and unconscionable fashion imaginable. In a typical life situation, i.e.,
12 purchasing a home, the weaker, unsophisticated homeowners were simply handed a purchase agreement,
13 told it is customary, standard and that everyone signs it, and were told to sign here and initial (most
14 likely being pressured to sign, rushed through the process and without an opportunity to seek legal
15 advice). Only now do Plaintiffs realize first hand the hidden oppressive motives of Defendants. The
16 average home purchaser, including Plaintiffs, lack the requisite sophistication to even suspect, much less
17 decipher, the deceptive language in the purchase agreements which attempts to strip them of every right
18 to implied warranty. Why would anyone knowingly and voluntarily waive all their implied warranties
19 and limit themselves to 1-2 years of warranty? Builders tend to lead homeowners into believing they
20 care all along stringing them along so that their warranty periods expire and trying to get statutes of
21 limitation and repose to lapse. They also tell homeowners misleading things like, “you have a 10 year
22 structural warranty.” Everyone knows such warranties only cover catastrophic damage where a house
23 is collapsing due to foundational issues.

24 Here, the evidence shows that the Sales Agreement warranty provision is both procedurally and
25 substantively unconscionable, and accordingly, the Court should deny enforcement of the provision.
26 Contrary to Defendants’ position, the warranty disclaimer is not conspicuous. The Sales Agreements are
27 each 27 pages long and the warranty disclaimer is found on page 17. While the disclaimer is in capital
28 letters, nothing else draws particular attention to this provision found within this lengthy sales document.
The font size of the paragraph is the same as the font throughout the document. In addition the font is

1 not underlined or bolded to draw attention to it. Moreover, the provision is found under a vague and
2 ambiguous paragraph heading called “Warranties”. The paragraph title itself makes no mention of
3 disclaimers or waived rights. Although other parts of the agreement require initials next to the provision,
4 the warranty provision does not call for it. That being said, the provision is vague, ambiguous,
5 misleading, inconspicuous and failed to apprise Plaintiffs of the consequences of a disclaimer. The
6 provision is also clearly one-sided in that the seller did not offer any additional consideration for the
7 disclaimer, and received the windfall of trying to escape all liability for a defective and damaged house
8 that Defendants knew, or should have known, had severe problems and defects, including the installation
9 of a defective and deficient plumbing system.

10 More importantly, there is a genuine issue as to material fact how the Defendants represented
11 the homes to Plaintiffs. Discovery is continuing. None of the Plaintiffs (30 homeowners) living in or
12 owning the 18 homes in this action have been deposed yet. Plaintiffs will contend that the warranty
13 provision was vague and ambiguous and not explained to them such that they knew they were waiving
14 important and substantive legal rights. Since Plaintiffs’ depositions have not occurred, there is no
15 testimony on the manner in which Defendants discussed or explained the warranty provisions with
16 Plaintiffs. Plaintiffs contend that *had* Defendants explained this information, Plaintiffs would have been
17 put on notice that the houses most likely had significant defects and problems and would have: (1)
18 declined to purchase, (2) requested more information on the condition of the house, (3) requested more
19 thorough inspections/tests and/or (4) would have requested a substantial discount for assuming the risk
20 passed off by the seller. Clearly, this clause is not procedurally or substantively conscionable and
21 Plaintiffs had no ability to negotiate it. Thus, Defendants’ motion for summary judgment must be denied
22 as homeowners’ deposition have not occurred and their testimony as to what warranty provisions
23 discussed during the sales process is critical to determining whether they voluntarily and knowingly
24 waived their warranty rights. Defendants filed this Motion for Partial Summary Judgment so that
25 Plaintiffs’ depositions could not be used to defeat it. The decision was strategic.

26 Moreover, since Plaintiffs allege that the Defendants recklessly and fraudulently misrepresented
27 the condition of the houses they sold to Plaintiffs, and that they recklessly or intentionally concealed
28 known defects, Defendants cannot assert an “as is” or other exclusionary clause as a defense.
Nevertheless, the purported disclaimer of warranties clause is unconscionable, an invalid warranty

1 disclaimer and is unenforceable.

2 Defendants have are estopped from asserting such waiver provisions as they have been
3 acknowledging and handling warranty claims by Plaintiffs even after expiration of the 1-2 year express
4 warranty period. See Affidavit of Joseph DeRose attached as **Exhibit 8**. As recently as 2008-2009,
5 Defendants accepted a warranty claim from the DeRoses and offered to repair their tile or pay money
6 so they could repair them. The DeRoses opted for the latter. Nevertheless, Defendants cannot now
7 assert warranty waiver provisions in the Sales Agreements when they have nullified those waiver
8 provisions by acting inconsistently with them, e.g., by accepting and processing warranty claims past
9 the warranty period.

10 Plaintiffs' Third Claim for Relief seeks declaratory judgment on contract provisions, including
11 this purported disclaimer of warranties. Since Defendants have not sought summary judgment on
12 Plaintiffs' Third Claim for Relief, it would be improper to grant summary judgment now without
13 Plaintiffs having an opportunity to conduct discovery, and without the depositions of Plaintiffs to
14 support what they knew or did not know about this purported disclaimer of warranties. After some
15 discovery, Plaintiffs will file a motion for declaratory relief so the Court can consider evidence and hear
16 testimony to see whether the purported disclaimer of warranty provision was valid or unconscionable.

17 **3. PN II, INC. IS A VALIDLY NAMED PARTY**

18 PN II, Inc. has conducted business under the name Del Webb at the time Plaintiffs' claims arose.
19 Del Webb filed a fictitious name certificate on September 6, 2002, where it listed PN II, Inc. as a
20 fictitious name pursuant to NRS 602.010. See Exhibit 3. Also, PN II, Inc. filed a fictitious firm name
21 for Del Webb, Pulte and Pulte Homes of Nevada. See Exhibit 3. There is no question that Del Webb
22 Communities, Inc. is a part of PN II, Inc. dba Pulte Homes, if not entirely owned and operated by it. The
23 standard letterhead used by Del Webb in its correspondence to homeowners includes the terms (1) "Pulte
24 Homes" and "the Communities of Del Webb" in the header and (2) the footer includes the web address
25 of www.pulte.com – the main website for Pulte. The address provided in the footer is 8345 W. Sunset
26 Rd., Las Vegas, Nevada 89113, is also the address for Pulte Homes in Las Vegas. See exemplar letter
27 from Del Webb/Pulte to Plaintiff Susan McIver dated October 20, 2006, attached as Exhibit 4. Thus,
28 there remains a genuine issue as to material fact whether PN II, Inc. assumed liabilities/assets for Del
Webb Communities, and if PN II, Inc purchased liabilities related to Plaintiffs houses and thus owes

1 warranties to Plaintiffs. Plaintiffs are informed and believe that PN II, Inc. is the corporate entity
2 controlling Pulte Homes, and all of Plaintiffs' dealings regarding warranty issues is through Pulte (PN
3 II, Inc.). Dismissal of all claims against PN II, Inc. would be premature as this case is still early in the
4 discovery stages and only through further discovery will PN II, Inc.'s full involvement in the case be
5 known. For example, Person Most Knowledgeable depositions must proceed on this issue. Further,
6 Defendants fail to meet their burden of proof under NRCP 56 as they admit no admissible or competent
7 evidence to show PN II, Inc. is not a property party. For example, none of the documents attached to
8 or referenced in (it is improper to ask the Court to take judicial notice of a record or document without
9 attaching it) Pulte's Motion for Partial Summary Judgment are verified or authenticated, thus they cannot
10 be considered for summary judgment purposes. NRCP 56(c). Plaintiffs are informed and believe that
11 some of the insurance and/or assets that will be satisfying a judgment, or funding a settlement, will come
12 from PN II, Inc. dba Pulte.

13 **4. PUNITIVE DAMAGES ARE VALIDLY ALLEGED AND SUPPORTED**

14 NRS 40.650 provides in pertinent part:

15 2. If a contractor, subcontractor, supplier or design professional fails to:

- 16 (a) Comply with the provisions of NRS 40.6472;
17 (b) Make an offer of settlement;
18 (c) Make a good faith response to the claim asserting no liability;
19 (d) Agree to a mediator or accept the appointment of a mediator pursuant to NRS 40.680; or
20 (e) Participate in mediation,

21 **the limitations on damages and defenses to liability provided in NRS 40.600 to 40.695, inclusive, do not apply** and the claimant may commence an action or amend a complaint to add a cause of action for a constructional defect without satisfying any other requirement of NRS 40.600 to 40.695, inclusive. (emphasis added)

22 **a. Defendants Did not Make a Good Faith Offer During Chapter 40 and Did**
23 **not Mediate in Good Faith**

24 In the case at hand, Defendants did not make a good faith offer of settlement based on evidence
25 or Chapter 40 entitlements, and they did not participate in mediation in good faith. Early in the case,
26 Del Webb made a woefully low monetary offer of \$7,800.00 (inclusive of attorney fees and costs)
27 instead of offering repairs as desired by Plaintiffs. See exemplar offer to Karl and Mary Bruner dated
28 April 13, 2007, attached as Exhibit 5 (all Plaintiffs received this same exact offer). After clarification
was requested, Pulte clarified that only \$5,700.00 of the \$7,800.00 offer was for repair costs, and did

1 not explain why \$2,100.00 was included. See copy of letter from Jason Williams, Esq. dated May 1,
2 2007, attached as Exhibit 6. This offer was not made in good faith, nor could it have been, as it utterly
3 failed to take any individual circumstances or Chapter 40 entitlements of homeowners into
4 consideration, thus they could not have been made whole under Chapter 40 or provided with repairs
5 “and” their Chapter 40 entitlements. Plaintiffs want their houses repaired, and have always asked Del
6 Webb to repair them, and will actually do so when they recover ‘sufficient’ money to do so using a
7 competent reconstruction general contractor of their choice. They do not want the headache or undue
8 burden of providing access and supervising/inspecting the repairs. They purchased their homes from
9 a general contractor (Defendants) so they would not have to purchase custom homes or hire their own
10 contractors and supervise them. Why should they now be forced to hire various sub-trades (and the low
11 bidders who crawled out of the woodwork¹ when the Kitec defects in Clark County became known) to
12 perform the work under their supervision? Clearly they should not. However, Pulte made a strategic
13 decision from the beginning to offer a woefully low amount of money to each homeowner with defective
14 Kitec (probably due to the class action it was facing involving thousands of homes), regardless of
15 personal or individual circumstances (e.g., health issues, varying square footage/fixtures and different
16 floor plans/models), thus this generic and unsupported offer, not based on any expert report produced
17 to Plaintiffs and conditioned on a general release of all liability (if the repair money offered is not
18 enough, the homeowner assumes the risk), was made in bad faith. Further, parties have been involved
19 in one Chapter 40 mediation (with Carl Flick, Esq.) and two mediations during litigation (with Ross
20 Feinberg and James Roberts), none of which settled the case because Pulte failed to mediate in good
21 faith and never offered anything other than the arbitrary and generic unsupported amount of \$7,800.00.
22 At the Chapter 40 mediation, representatives of all 19 homes appeared in person. Pulte, after dragging
23 all these senior citizens down to mediation, said it was sending a message that no more than \$7,800.00
24 would ever be offered to them. Pulte has not made a good faith effort to resolve the case, and especially
25 not during Chapter 40 when these claims are supposed to get resolved without enormous attorney’s fees
26

27 ¹Del Webb is able to contend that such a small repair cost is involved due to these out of state
28 re-piping contractors (without proven track records) who have surfaced and who have provided massive
group discounts for getting 100's or 1,000's of repair jobs. These re-piping contractors are inundated
with repair jobs, are mostly unavailable and pass many responsibilities onto homeowners, e.g.,
repainting, moving fixtures/furniture, calling for inspections, providing access, etc. Since various trades
are involved, there is no general contractor to supervise, coordinate and inspect.

1 and costs, and it absolutely refuses to go above the arbitrary and generic offer of \$7,800.00, if it is even
2 still offered.² Thus, Plaintiffs are not limited to damages as set forth in NRS 40.655, as expressly stated
3 in NRS 40.650(2) and NRS 40.655, which includes being able to seek general, consequential and
4 punitive damages. In the very least, a genuine issue as to material fact exists whether Plaintiffs are
5 entitled to seek damages in addition to those specified in NRS 40.655 pursuant to NRS 40.650, and
6 discovery should be permitted, or the issue should be decided by the jury.

7 Plaintiffs are allowed punitive damages when Defendants' commits malice, oppression or fraud.
8 NRS 42.001, *Countrywide Home Loans, Inc. v. Thitchener*, 192 P.3d 243, 252 (Nev. 2008). Malice is
9 defined as express or implied conduct which is intended to injure a person or despicable conduct which
10 is engaged in with a conscious disregard of the rights or safety of others. Oppression means despicable
11 conduct that subjects a person to cruel and unjust hardship with conscious disregard of the rights of the
12 person. *Id.* Both definitions utilize conscious disregard of a person's rights as a common mental element,
13 which in turn is defined as "the knowledge of the probable harmful consequences of a wrongful act and
14 a willful and deliberate failure to act to avoid those consequences."

15 Here, although the burden is on Defendants for the purposes of a motion for summary judgment
16 to show the Court there are no genuine issues as to material fact and that judgment should be entered
17 as a matter of law, Defendants do not include or reference 'any' affidavits or any of the so-called
18 "evidence" attached to the motion in support of their argument that there are no disputes as to whether
19 they consciously disregarded the rights of Plaintiffs. The Affidavit of Mr. Stremel is only in support of
20 Defendants' Opposition to Plaintiffs' Motion for Leave to Amend Complaint and cannot be considered
21 as evidence in support of Defendants' Counter-Motion for Partial Summary Judgment. Defendants acted
22 knowingly, willfully and deliberately, and with conscious disregard for Plaintiffs and their property when
23 they installed Kitec fittings which were known to be inferior and especially when used in Clark County
24 houses subject to the hard, high sulfate content water, and which intentionally and deliberately violated
25 approved plans. See Affidavit of Mr. Kreitenberg, Para. 5 (Exhibit 2). Pulte deliberately and
26 intentionally failed to act to avoid the consequences of inadequate pipe failure when it installed Kitec.

27
28 ²To add insult to injury, Pulte recently served even lower offers of judgment on Plaintiffs in the
generic and arbitrary amount of \$6,500.00, inclusive of all fees, costs and prejudgment interest. These
offers of judgment were served after Pulte had Plaintiffs cost of repair estimates showing repairs costs
per house ranging from \$15,000 to \$22,000, and after Pulte knew of Plaintiffs' attorney's fees and costs
in excess of \$83,000.

1 Defendants could have used a different system with proper fittings (like the PEX system specified in the
2 approved plans) that would have lasted and performed, but instead chose to save costs and cash in on
3 a group rate provided by IPEX, the manufacturer of Kitec. In the very least, genuine issues as to material
4 fact exist as to the culpability state of Del Webb and what it knew about water conditions in Clark
5 County when it chose to deviate from approved plans and install defective Kitec piping instead of
6 superior PEX piping.

7 **b. Claims for Personal Injury are Not Subject to NRS 40.600 et seq.**

8 NRS 40.635 provides:

9 Applicability; effect on other defenses. NRS 40.600 to 40.695, inclusive:

- 10 1. Apply to any claim that arises before, on or after July 1, 1995, as the result of a
11 constructional defect, **except a claim for personal injury** or wrongful death, if the claim
12 is the subject of an action commenced on or after July 1, 1995.
- 13 2. Prevail over any conflicting law otherwise applicable to the claim or cause of action.
- 14 3. Do not bar or limit any defense otherwise available, except as otherwise provided in
15 those sections.
- 16 4. **Do not create a new theory upon which liability may be based, except as
17 otherwise provided in those sections.**

18 [Emphasis added]

19 In the case at hand, Plaintiffs are alleging construction defect claims and also personal injury
20 claims (through proposed amendment). NRS 40.635(1) clearly provides that personal injury claims are
21 not governed by NRS 40.600 to 40.695, which includes NRS 40.655 (construction defect damages).
22 Further, NRS 40.635(4) provides that NRS 40.600 to NRS 40.695 do not create a new theory upon
23 which liability may be based, except as otherwise provided in those sections. That means common law
24 torts may be alleged against a contractor for personal injuries and related damages. Due to the “one
25 action rule,” Plaintiffs are required to bring all of their claims against Defendants related to the Kitec
26 issues in this lawsuit, and will be barred from doing so later in another action. Thus, it would be unfairly
27 prejudicial to prevent Plaintiffs from seeking all relief necessary to make them whole.

28 Therefore, it is entirely proper for Plaintiffs to seek punitive damages against Defendants.
Pursuant to NRS 42.001 and NRS 42.005, the causes of action alleged by Plaintiffs entitle them to seek
punitive damages. If Defendants want to file dispositive motions later, they are free to do so. Therefore,
the amendment should be permitted and it should relate back for limitations purposes to the filing of
the initial Complaint as it gave fair notice of the facts from which the new claims arise. *Nelson, supra*,

1 99 Nev. 548, 665 P.2d 1141. Whenever the claim or defense asserted in the amended pleading arose out
2 of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading,
3 the amendment relates back to the date of the original pleading. NRC P 15(c).

4 **c. A Violation of NRS Chapter 116 Permits Plaintiffs to Seek Punitive**
5 **Damages**

6 NRS 116.4117 provides:

7 1. If a declarant or any other person subject to this chapter fails to comply with any of its
8 provisions or any provision of the declaration or bylaws, any person or class of persons
9 suffering actual damages from the failure to comply has a claim for appropriate relief.

10 2. Subject to the requirements set forth in NRS 38.310 and except as otherwise provided
11 in NRS 116.3111, a civil action for damages caused by a failure or refusal to comply
12 with any provision of this chapter or the governing documents of an association may be
13 brought:

14 (a) By the association against:

15 (1) A declarant; or

16 (2) A unit's owner.

17 (b) By a unit's owner against:

18 (1) The association;

19 (2) A declarant; or

20 (3) Another unit's owner of the association.

21 **3. Punitive damages may be awarded for a willful and material failure to comply**
22 **with this chapter if the failure is established by clear and convincing evidence.**

23 4. The court may award reasonable attorney's fees to the prevailing party.

24 5. The civil remedy provided by this section is in addition to, and not exclusive of, any
25 other available remedy or penalty.

26 [Emphasis added]

27 Since Defendants were the statutory Declarant under NRS Chapter 116 and the CC&R's for this
28 community, they owed duties to Plaintiffs and are subject to the "protection of purchaser" statutes of
NRS Chapter 116 (see NRS 116.4101 et seq.). If during discovery Plaintiffs can show Defendants
engaged in conduct amounting to a willful and material failure to comply with NRS Chapter 116, then
punitive damages may be awarded. Clearly NRS Chapter 116 claims may be brought along side NRS
Chapter 40 claims, and it is done all the time by homeowners associations and homeowners.³ In fact,
Plaintiffs are required to bring all of their claims in this action or face losing them forever. As stated
above in Plaintiffs' Reply in Support of Motion for Leave to Amend, and in Mr. Kreitenberg's affidavit

³This firm has cases in Department 16 and 19 with construction defect and fraud/intentional tort claims, and in Department 16 punitive damages in addition to Chapter 40 damages are being sought. Judge Williams is treating them separately, but both stay together and will have the same trial.

1 (Exhibit 2), Defendants deliberately, knowingly and intentionally violated the approved
2 plans/specifications and did not disclose that deviation to Plaintiffs. Thus, they failed to comply with
3 NRS Chapter 116, and specifically NRS 116.4114 and 116.4115. Also, **NRS 116.4103(1)(h) provides**
4 **that a Declarant (Defendants) must explain the terms and significant limitations of any warranties**
5 **provided, including any statutory warranties and limitations on the enforcement thereto or on**
6 **damages.** Plaintiffs contend that Defendants violated NRS 116.4114 by breaching warranties, violated
7 NRS 116.4115 by improperly trying to disclaim statutory warranties and violated NRS 116.4103(1)(h)
8 by not properly explaining the terms and significant limitations in the Public Offering Statements of any
9 warranties provided, and limitations on the enforcement thereto or on damages. In the very least,
10 genuine issues as to material fact exist whether Defendants violated provisions of or failed to comply
11 with NRS Chapter 116, which would permit Plaintiffs to seek punitive damages, so granting summary
12 judgment is improper at this juncture.

13 **d. Plaintiffs' Third Claim for Relief Seeks Declaratory Judgment on Whether**
14 **Defendants Failed to Comply with Chapter 40**

15 As stated in the preceding Section 3, a violation of Chapter 40 and failure to comply with its
16 provisions permits Plaintiffs to recover damages outside of those set forth in NRS 40.655. See NRS
17 40.650 and NRS 40.655. Plaintiffs Complaint, the Third Claim for Relief, seeks declaratory relief on
18 whether Defendants failed to comply with Chapter 40, violated it by making its bad faith offers without
19 support and its failure to mediate in good faith. Plaintiffs should be permitted to engage in discovery
20 so that they can prove this claim for relief through a motion for declaratory relief. Since that claim is
21 alleged in the Complaint and Defendants do not seek summary judgment on it, it would be improper to
22 grant summary judgment here before Plaintiffs have the opportunity to file a motion for declaratory relief
23 after some discovery has occurred, e.g., taking the Person Most Knowledgeable depositions on Chapter
24 40 negotiations, offers and conduct.

25 **e. Discovery is Needed Before Summary Judgment can be Granted – NRCP**
26 **56(f)**

27 If the Court is inclined to grant summary judgment in any respect, pursuant to NRCP 56(f),
28 Plaintiffs request that time be allowed to conduct discovery before the motion for summary judgment
is granted. Plaintiffs have not deposed any Persons Most Knowledgeable, any agents/brokers responsible
for fraud and misrepresentations or any experts. See Affidavit of Neal K. Hyman attached as Exhibit

1 7. The parties are in the early stages of discovery. Plaintiffs need to depose agents, brokers and Persons
2 Most Knowledgeable of Defendants to obtain facts and documents in their exclusive possession to
3 support the fraud/punitive damages claims. Defendants were on notice of intentional conduct and failure
4 to disclose allegations in the initial Complaint (see Paras. 28 and 55, and Prayer for Relief No. 6) from
5 the beginning so they cannot claim surprise or unfair prejudice. They are clearly on notice and can
6 answer and defend, as they have been doing. There is no prejudice and plenty of time for discovery.
7 Trial is not until September 7, 2010, and there is time for an extension of the discovery cut-off if
8 necessary. Also, at two mediations, Del Webb was informed Plaintiffs would be seeking leave to
9 prosecute fraud and intentional conduct claims, as well as punitive and other damages due to their
10 blatant failure to comply with Chapter 40.

11 **CONCLUSION**

12 Since NRC 15(a) provides that leave shall be freely granted when justice so requires, it should
13 be granted here as there is no delay or unfair prejudice and Plaintiffs have alleged fraud and other
14 tortious conduct with particularity. Plaintiffs should be permitted to engage in discovery, and depose
15 agents/brokers, so that evidence to further support fraud is obtained. Regarding other tortious claims,
16 Defendants do not oppose their amendment, nor do they have to be pled with particularity (e.g.,
17 misrepresentation, failure to disclose defects and breach of covenant of good faith and fair dealings).
18 Defendants do not oppose dismissal “without prejudice” of non-kitec defect allegations, or adding the
19 names of trustees and removal of Mary Richard.

20 As shown through the affidavit of Mr. Kreitenberg (Exhibit 2), Pulte violated the approved plans
21 and specifications by installing a Kitec plumbing system instead of the specified and approved system
22 – PEX. PEX is a stand along system. This is not a matter of simply substituting a product or
23 manufacturer. Plaintiffs were entitled to receive PEX plumbing systems as they were entitled to expect
24 Defendants to follow building codes and approved plans. Since it cannot be said that Defendants did
25 not willfully, deliberately or knowingly install Kitec when the approved plans called for PEX, there is
26 sufficient basis to allege fraud and other tortious claims, and leave should be freely granted. The grant
27 or denial of an opportunity to amend is within the discretion of the trial court, but outright refusal to
28 grant the leave without any justifying reason appearing for the denial is not an exercise of discretion, it
is merely an abuse of that discretion and inconsistent with the spirit of the Nevada Rules of Civil

1 Procedure. *Adamson, supra*, 85 Nev. 104, 507 P.2d 138, and discovery needs to proceed on these issues.
2 See Affidavit of Neal K. Hyman attached as Exhibit 7. Also, since this community was built after other,
3 similar communities built by Defendants., e.g., Sun City Summerlin, which had the same or similar
4 plumbing systems, Defendants knew, or should have known through the use of reasonable diligence, that
5 the Kitec pipe fittings would corrode and be subject to failure when used with hard, high-sulfate Clark
6 County water. This is more evidence to support fraud and other tortious claims.

7 If the Court decides to hear the improper “counter-motion,” which does not relate to the Motion
8 for Leave to Amend, Plaintiffs have raised many genuine issues as to material fact whether the purported
9 waiver of warranties provision, buried on page 17, in Section 5.1, under a misleading title called
10 “Warranties,” and not in bold or larger font, and which was clearly part of an adhesion contract for
11 which no negotiations were possible, is if the waiver of warranties clause is enforceable or
12 unconscionable. In fact, Plaintiffs’ Third Claim for Relief seeks declaratory judgment on that issue, but
13 some discovery is needed. Plaintiffs, Persons Most Knowledgeable and agents/brokers have not been
14 deposed. Also, under NRS 40.640(5) and NRS 116.4115(1) and (2), the purported disclaimer of
15 warranties is ineffective as they were not specific and did not list out specific defects to be disclaimed,
16 did not disclose constructional defects to Plaintiffs before their purchases of residences, was not
17 provided in language that is understandable and was not written in underlined and boldfaced type with
18 capital letters and "as is," "with all faults," or other language that in common understanding calls the
19 purchaser's attention to the exclusion of warranties.

20 Due to Defendants’ failure to comply with Chapter 40 by making bad faith offers of \$7,800.00
21 without any expert report or support, and not mediating in good faith, Plaintiffs are not limited to
22 damages set forth in NRS 40.655. See NRS 40.650 and NRS 40.655. Plaintiffs have sought in their
23 Third Claim for Relief declaratory relief on this issue. It would be improper to grant summary judgment
24 now without giving Plaintiffs the opportunity to take Person Most Knowledgeable and expert
25 depositions, and without Plaintiffs depositions being taken. Also, NRS 116.4117(3) provides that
26 punitive damages can be sought for failure to comply with NRS Chapter 116. Since Plaintiffs are
27 alleging Defendants failed to comply with NRS Chapter 116, and specifically regarding “protection of
28 purchaser” provisions, discovery should be permitted to proceed so Plaintiffs can obtain facts and
evidence to support those claims. Pursuant to NRCP 56(f), Plaintiffs should be permitted to engage in

1 discovery before the Court even entertains a motion for summary judgment.

2 Summary judgment is improper regarding PN II, Inc. as Del Webb and PN II, Inc. may turn out
3 to be the same company and PN II, Inc. may have assumed assets and liabilities of Del Webb, which
4 would include warranty obligations owed to Plaintiffs and the responsibility of paying a settlement or
5 judgment through insurance or otherwise. Del Webb filed a fictitious name to do business as Pulte
6 Homes (which is PN II, Inc.). PN II, Inc. filed fictitious firm names for Del Webb, Pulte and Pulte
7 Homes of Nevada. Correspondence sent to Plaintiffs shows the letter as being Del Webb and Pulte and
8 they share the same address and website. Plaintiffs are informed that PN II, Inc. assumed liabilities of
9 Del Webb and is responsible for paying a settlement or satisfying a judgment, and its insurance may
10 apply to this action.

11 If Defendants raise any new points and authorities not raised in their counter-motion, or if they
12 attempt to argue something new at the hearing, Plaintiffs move to strike any and all such new points,
13 authorities and argument as it conflicts with EDCR 2.20(a) and (f). Permitting Defendants to raise new
14 points, authorities and arguments would preclude Plaintiffs from being able to respond, even more than
15 the improper counter-motion accomplished by giving Plaintiffs much less time to file an Opposition.

16 For all of the aforementioned reasons, the Counter-Motion for Partial Summary Judgment should
17 be denied in its entirety.

18 DATED this 14th day of April, 2009.

19
20
21 **THE LAW OFFICES OF NEAL HYMAN**

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